Brief in Support of Petition for Writ of Certiorari

I) STATEMENT OF ISSUES

The commodities herein involved, as set forth in the opinion below, consist of these three articles:

a) Creme de cassis made by placing black currants in wine alcohol for 50 or 60 days and mixing the resultant juice with sugar (R 42). It contains 43 percent of sugar by weight and 15 percent of alcohol by volume, or about 12 percent by weight. The remaining 45 percent by weight would assumably be composed of currant juice, with some water. It was (R 42):

> . . . admittedly not consumed in the condition imported, but used chiefly for making cocktails and as flavoring for drinks, . . .

For tariff purposes it was held by the court below (R 44) to be dutiable under a provision for alcoholic "fruit juices and fruit sirups," rather than under a provision for "cordials," as held by the collector of customs.

b) Green menthe made by distilling wine alcohol and mint plants together, then mixing the "second run" thereof with sugar sirup (R 45). It contains 37 percent of sugar by weight, and 30 percent of alcohol by volume, or about 24 percent by weight. The remaining 39 percent by weight would assumably consist of water and flavoring substances. Petitioner did not contest the tariff classification of this article under a provision for "cordials."

c) Cherry cordial made by placing fresh cherries in alcohol for 60 days and mixing the resultant juice with

wine alcohol and sugar sirup (R 45). It contains 25.5 percent of sugar by weight, and 32 percent of alcohol by volume, or about 24 percent by weight. The remaining 50.5 percent by weight would assumably consist largely of cherry juice, with some water and flavoring substances. The tariff classification of this article under a provision for "cordials" was likewise not contested by petitioner.

Above-stated percentages by weight of sugar and alcohol do not appear directly in the record, but are based on well-known scientific formulas as applied to data contained in the evidence and mentioned in the opinion below (R 42, 45). It should be noted that in each instance sugar preponderates over alcohol.

Because products of this character consist of spirits and other substances they are not "distilled spirits" within the common meaning of that term. See *Wing Yee Chong v. US*, *Shun Yuen Hing v. US*, and *Brown v. US*, 11 CCA 329, 331, 402; *Rosenbloom v. US*, 13 CCA 63, and *Los Angeles Trading Co. v. US*, 13 CCA 330. See also "spirits" as defined in Standard Dictionary, Century Dictionary, Webster's International Dictionary, and Encyclopedia Britannica. In addition, see *Batjer v. US*, 11 CCA 60, wherein it was said in regard to pertinent legislation (pp. 60, 61):

> For more than 75 years spirits distilled from grain and other materials and cordials have been differentiated by Congress and have been provided for in numerous tariff acts as separate and distinct entities . . . In the absence of any manifest legislative intent to the contrary we must conclude, and in fact the government admits, that the distinction between

> cordials and distilled spirits still continues and that the latter designation does not include the former . . . From this it follows that the cordials under consideration are not classifiable as distilled spirits. . . .

Despite this well-recognized distinction, the involved products were assessed with tax as "distilled spirits" under section 600 (a), Revenue Act of 1918 as amended by the Liquor Taxing Act of 1934, which, as codified in 1934, read:

> Section 1150. Tax. (a) Rate (1) Distilled spirits generally. On and after January 12, 1934 there shall be levied and collected on all *distilled spirits* produced in or *imported* into the United States an internal revenue tax of $2 on each proof gallon or wine gallon when below proof . . . to be paid by the distiller or importer when withdrawn from bond.

The court below upheld this assessment by finding that the merchandise contained alcohol and therefore came within the phrase "including all dilutions and mixtures of this substance," in RS 3248, which reads as follows:

> That distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of *this act*, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, *including all dilutions and mixtures of this substance*, and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

II) ARGUMENT

a) *Scope of RS 3248:* Petitioner contends that this definition does not bring within the term "distilled spirits," as found in the taxing statute, any dilution or mixture other than a dilution or mixture occurring in the process of distillation when carried on in this country; in other words, that the mixing of spirits with other products, *after distillation has been completed,* does not create a dilution or mixture of the kind referred to in RS 3248.

This contention finds support, so far as domestic products are concerned (such as cordials, medicines, etc., containing alcohol) from the fact that such products have never been subjected to internal taxation as "distilled spirits." Rather, the alcohol *when originally produced* has been so taxed, and then, if the post-distillation product was a beverage, it was separately taxed as a rectified product or taxed *eo nomine* as a cordial. For example see 12 Internal Revenue Record 205 of November 23, 1870, wherein the Commissioner of Internal Revenue held that cordials produced by a process of *mixing* material with distilled spirits were taxable as rectified products and not as distilled spirits. To the same effect see the ruling of November 17, 1869, 10 IRR 169, relating to cordials, anisette and bitters, and 10 IRR 65, relating to bitters.

Also, see IRTD 20498, January 4, 1899, holding that manufacturers of cordials containing large amounts of alcohol and sugar are subject to tax as rectifiers; IRTD 33, February 3, 1900, holding creme de menthe to be a compound of distilled spirits with other materials, and the

producer to be a rectifier; and IRTD 4616, November 23, 1936, holding cordials prepared with distilled spirits and not containing fortified wine to be subject to the rectification tax of 30 cents per proof gallon.

Additional support for petitioner's contention as to the scope of RS 3248 is found in the fact that section 4 of the Act of July 20, 1868 (supra, p. 4), from which RS 3248 was taken, clearly related only to products of a distillery and to "dilutions and mixtures" occurring during distillation. This is established by the injunction therein that "the tax shall attach to this substance *as soon as it is in existence* as such," and by the fact that the latter portion of the section prohibits any person from using "spirits or alcohol . . . in manufacturing . . . any . . . article . . . unless the spirits or alcohol . . . have been . . . tax paid." See also IRTD 2387 of Oct. 20, 1916, stating that spirits used in the manufacture of cordials must first be tax paid.

Therefore, as the law specified that "the tax shall attach to this substance (ethyl alcohol . . . including all dilutions and mixtures) as soon as it is in existence as such," it is obvious that a domestic cordial is not a "mixture" such as is referred to in RS 3248.

In order to present this subject thoroughly it would be necessary to refer to many rulings and decisions preceding passage of the act of 1868 which, when considered in conjunction with the terms of the act and in conjunction with the several rulings and decisions immediately thereafter, clearly show that the purpose of said section 4 extended only to taxation of domestic distillery products; also, that

this purpose was recognized and applied in administration of the law. However, such a presentation would so enlarge this brief as to result in probable infraction of the court's rule as to conciseness. Therefore it will only be said that the history of RS 3248, including the period of time when it was section 4 of the Act of July 20, 1868, shows that it has not been regarded by those entrusted with its administration as a definition applicable to domestic post-distillation "dilutions or mixtures." In brief, products of distillation, whether alcohol or dilutions and mixtures containing alcohol, have been taxed as "distilled spirits," and other alcoholic "mixtures" have not been so taxed.

In consideration of the above premise and the premise that the law in question (section 4, Act of July 20, 1868) was, as held below (R 49), enacted in regard to domestic products, question arises as to whether somehow, by codification in 1874, it attained a broader scope.

The court's conclusion in this regard is clearly contrary to the cases already referred to in the petition, and therefore will not be further discussed. Consequently, there remains for consideration the question of whether in 1917, when imported distilled spirits were taxed for the first time (sec. 300, Revenue Act of 1917), in 1919 when that tax was continued (sec. 600, Revenue Act of 1918), and in 1934, when Congress amended the 1919 act (sec. 1, Liquor Taxing Act of 1934), the purpose was to require assessment, *by virtue of RS 3248*, of the distilled-spirits tax on articles which contained distilled spirits but were not in fact a distilled spirit.

b) *Congressional intent as to the import tax on "distilled spirits":* As to this point the court below held (R 50):

> . . . The definition in the first part of the section is complete, and it is our view that when Congress enacted the revenue acts above referred to, levying an internal revenue tax on *imported* distilled spirits, as well as domestic distilled spirits, it had in mind the applicability of the definition in RS 3248, which was unrepealed and in full force and effect.

Also (R 51):

> . . . Our holding is based upon the proposition that Congress, RS 3248 being in full force and effect *when it enacted the internal revenue tax provision here in controversy, intended* that the new law be read in the light of the definition then in full force and effect.

Stated differently, the court found, without any supporting statutory implication, that in 1917, 1919 and 1934 Congress *intended* to broaden the existing purpose and meaning of RS 3248.

This holding conflicts with *Panama Railroad v. Johnson,* 264 US 375, 385, stating that where existing legislation has been revised and restated in a comprehensive statute (as here by the Revised Statutes), "subsequent enactments touching on that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose." See also *US v. Jefferson Elec. Mfg. Co.,* 291 US 386, 396, and *US v. Barnes,* 222 US 513, 520, to the same effect. Furthermore,

such a conclusion as to congressional intent should be manifest from the act in question or its history, and for reasons stated below this is particularly true as to the enactment of the Liquor Taxing Act of 1934.

Prior to enactment of that act it had been specifically held in *Batjer v. US*, 11 CCA 60, 62, that the designation "distilled spirits" did not include imported alcoholic cordials. Also, in *Wing Yee Chong v. US*, *Shun Yuen Hing v. US*, and *Brown v. US*, 11 CCA 329, 331, 403, it was held that imported medicinal preparations containing alcohol and other ingredients were not taxable under the Revenue Act of 1918 as "distilled spirits"; and, in *Rosenbloom v. US*, 13 CCA 63, Fernet Branca bitters, a spirituous beverage containing distilled spirits as its component part of chief value, were held not to be taxable under the provision in the Revenue Act of 1917 for "distilled spirits . . . produced in or imported into the United States." Therefore when Congress enacted the Liquor Taxing Act of 1934, amending section 600 of the Revenue Act of 1918 so as to require taxation of imported "distilled spirits" at $2 per proof gallon, it was presumptively aware of the decisions cited above. Consequently it should not now be assumed that Congress intended to treat as "distilled spirits" articles of the class which in said decisions had been held not to be "distilled spirits."

c) *Basis of court's decision:* In respect to petitioner's contention that the term "dilutions and mixtures" (RS 3248) was never intended to apply to anything except such dilutions and mixtures as are direct products of the distillation process as carried on in this country, the court below said (R 51, emphasis added):

> . . . Even if that were regarded as the true situation up to the enactment of the internal revenue laws affecting imported distilled spirits (acts of 1917-1919 and 1934) it would not change the conclusion here. *Our holding is based upon the proposition that Congress,* RS 3248 being in full force and effect when it enacted the internal revenue tax provisions here in controversy, *intended that the new law be read in the light of the definitions then in full force and effect.*

In other words, it was found that, without any change whatever in pertinent statutes, Congress intended the pre-existing statute to be applied to a subject which was not within its original scope. This is contrary to rules of statutory construction outlined heretofore.

The court below also stated in regard to its conclusion as to the scope of RS 3248, that (R. 50):

> . . . Otherwise, it seems unbelievable that Congress, having so often dealt with the question, should not have given a definition of the term "distilled spirits" *in each of the internal revenue acts* which apply to imported distilled spirits.

This of course assumes that when legislating in regard to imported distilled spirits Congress not only intended to tax articles commonly known as such, but intended to tax products such as are here involved, and that by reason of RS 3248 Congress deemed it unnecessary to identify the latter products.

This conclusion is contrary, however, to the clear implications of the fact that actually, when imposing duty upon imported distilled spirits, Congress in RS 2504 (Schedule D) not only provided that "spirits" should be

assessed with a duty of $2 per gallon, but *also* provided separately that "compounds or preparations of which distilled spirits is a component part of chief value" and "cordials, liqueurs . . . and other similar spirituous beverages" should be so taxed. In addition, since the enactment of RS 3248 there have been eight tariff revisions, and in each of these Congress has separately named "cordials," "liqueurs," "spirits," and "compounds or preparations," etc., *even though all these commodities were taxed at the same rate.* Such legislation is clear evidence that during all of those years Congress did not consider that RS 3248 had the scope assigned to it by the court below; for if this were so, the single enumeration "spirits" would have been an adequate description. The tariff provisions referred to appeared in each of the acts enumerated below, in substantially the following language taken from Schedule H, Tariff Act of 1883, 22 Stat. 505:

> Brandy, and other spirits manufactured from grain or other materials and not specially enumerated or provided for in this act, two dollars per proof gallon. . . .
>
> On all compounds or preparations of which distilled spirits are a component part of chief value, not specially enumerated or provided for in this act, there shall be levied a duty not less than that imposed upon distilled spirits.
>
> Cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and other spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon.

To the same effect see paragraphs 329, 331, and 332, Tariff Act of 1890, 26 Stat. 589; paragraphs 237, 239, and

240, Tariff Act of 1894, 28 Stat. 525; paragraphs 289, 291, and 292, Tariff Act of 1897, 30 Stat. 173; paragraphs 300, 302, and 303, Tariff Act of 1909, 36 Stat. 39, 40; paragraphs 237, 239, and 240, Tariff Act of 1913, 38 Stat. 135-6; also, paragraph 802, Tariff Acts of 1922 and 1930, 42 Stat. 877, and 46 Stat. 639, wherein the above provisions were merged, as follows:

> Par. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds (except angostura bitters, Tariff Act of 1922) containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon.

The provisions in these acts for "compounds or preparations of which distilled spirits are a component material of chief value" further demonstrates that Congress did not consider that the definition in RS 3248 related to imported products, for if it did, then such "compounds or preparations" were dutiable as "spirits" and no need existed for the separate enumeration. Therefore, as to all of this legislation, insofar as it related to cordials, liquors, spirituous beverages or compounds or preparations, it must be assumed that Congress did a needless act in providing for such articles, if the conclusion expressed by the court below as to the scope of RS 3248 be accepted.

d) *The scope of RS 3254:* Contrary to the opinion of the trial court (R 37) in regard to the "green menthe," the court below found (R 49) "it unnecessary to consider

the question of the applicability of RS 3254." However, this section will be briefly referred to by petitioner. It reads as follows:

> Sec. 3254. All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

The section originated in the joint resolution of February 5, 1867, secs. 1-2, 14 Stat. 565, and its legislative history clearly shows that it was intended to relate only to the products of domestic distillers. However, as RS 3254 is not of particular interest in respect to the annexed petition, it will not be further discussed except to say that the wording of the section precludes its application to the instant products. The cassis and the cherry cordial are not "products of distillation," but products of infusion; and although the green menthe might possibly be considered as a product of distillation, the section is inapplicable because of its qualification in regard to alcohol "on which the tax imposed by law has not been paid," such alcohol obviously being domestic alcohol and not foreign alcohol.

e) *Pertinency of Jordan v. Roche:* The remaining point in the decision below concerns this court's opinion in *Jordan v. Roche,* 228 US 436, which it is said (R 52) is "pertinent in considering the comprehensiveness of the section" (RS 3248).

In the *Jordan* case it was determined that bay rum containing alcohol and brought into this country from

Puerto Rico was taxable as "distilled spirits" by virtue of the Foraker Act requiring Puerto Rican products to be assessed with a tax "equal to the internal revenue tax imposed in the United States *on like articles of domestic manufacture.*"

After quoting the italicized words this court stated (p. 441) that "upon the quoted words the controversy in this case turns," and the court then discussed in considerable detail the method by which domestic spirits were taxed, this discussion including a reference to RS 3248.

Although the court's conclusion was that the Puerto Rican product was taxable as distilled spirits, the decision is actually a finding that Puerto Rican bay rum was a "like article" to domestic bay rum. Therefore, as the alcohol contained in domestic bay rum was taxed as "spirits," it was held that a like tax was properly imposed upon the Puerto Rican product. Consequently, even though RS 3248 is referred to in that opinion, the decision does not hold that bay rum was within the dilution-and-mixture clause, for that point was not in issue and did not require determination under the Foraker Act.

III) CONCLUSION

Because the decision below incorrectly determined the scope of the Act of July 20, 1868, and is based upon an erroneous conclusion as to congressional intent when codifying this statute in 1874, and as this conclusion is con-

trary to analogous decisions by this court, it is submitted that this petition should be granted.

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